



October 23, 2002

Ms. Janice Mullenix
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2002-5994

Dear Ms. Mullenix:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 171140.

The Texas Department of Transportation ("department") received a request for the employment records of a named individual. You state that you will release some of the information responsive to this request. You claim that the submitted information is excepted from disclosure under section 552.101 of the Government Code in conjunction with the Family Medical Leave Act. We have considered the exception you claim and reviewed the submitted information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes such as the Family and Medical Leave Act, 29 U.S.C. § 2654 ("FMLA"). Section 825.500 of chapter V of title 29 of the Code of Federal Regulations identifies the record-keeping requirements for employers that are subject to the FMLA. Section 825.500 states in pertinent part:

(g) Records and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if ADA is also

applicable, such records shall be maintained in conformance with ADA confidentiality requirements (see 29 CFR § 1630.14(c)(1)), except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and
- (3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500. You claim that "Exhibit B" is excepted under section 552.101 in conjunction with the FMLA. You assert that the submitted information is maintained in confidential files per the FMLA as information related to medical certifications, recertifications or medical histories.

Having considered your representations and having reviewed the submitted information, we have marked the portions of "Exhibit B" that we find relate to medical certifications, recertifications or medical histories of employees or employees' family members. *See* 29 C.F.R. §§ 825.207(g) (explaining paid sick leave under FMLA), 825.305 (discussing types of medical certification necessary for FMLA leave), 825.306 (noting information required in medical certification), 825.310 (construing "fitness-for-duty" reports). Because we conclude that none of the release provisions of FMLA apply to this information, you must withhold the marked portions of "Exhibit B" under section 552.101 of the Government Code in conjunction with the FMLA.

Section 552.117 may also be applicable to some of the submitted information. Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the department may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. If the employee whose records have been submitted timely elected to keep his personal information confidential, the department must withhold the information we have marked pursuant to section 552.117. The department may not withhold this

information under section 552.117 if the employee did not make a timely election to keep the information confidential.

In summary, you must withhold the marked portions of "Exhibit B" under section 552.101 of the Government Code in conjunction with the FMLA. You must also withhold the information we have marked pursuant to section 552.117, if the employee whose records have been submitted timely elected to keep his personal information confidential. The remainder of the submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

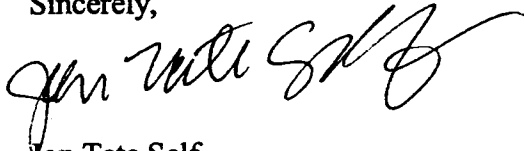
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, *no writ*).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be

sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Jon Tate Self", written over the word "Sincerely,".

Jon Tate Self
Assistant Attorney General
Open Records Division

JTS/seg

Ref: ID# 171140

Enc. Marked documents

c: Ms. Pam Frith
Rydman Record Retrieval
2312 Western Trails Boulevard, Suite 204
Austin, Texas 78745-1642
(w/o enclosures)